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Supreme Court, U.S.
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No. 03-1622

In the Supreme Court of the United States

MATTHEW FOUBERT, Officer,
Petitioner,

v.

CHERYL D. LYONS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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REVIEW OF THE QUESTIONS PRESENTED

1. When some undisputed facts in the record support an officer's inference that a suspect posed a risk of harm to a fellow officer, does the qualified immunity doctrine of *Saucier v. Katz*, 533 U.S. 194 (2001) permit a court to deny qualified immunity: (a) based not on the totality of the circumstances known to the officer but, instead, solely on the visible circumstances at the time he used force; (b) based on cases whose fact patterns under *Saucier* are "distinguishable in a fair way" from this case; and (c) based on case law decided after the incident at issue?

2. Should this Court, in a case alleging the use of constitutionally excessive force, create an exception to or limit the precedential effect of the "constitutional-question-first" rule, recently addressed in *Bunting v. Mellen*, 124 S.Ct. 1750 (2004), when such rule operates to create "clearly established" law and the declared law in turn operates under *Saucier* to generally overcome the qualified immunity of police officers making similar split-second decisions?

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REPLY BRIEF FOR PETITIONER

Upon interlocutory appeal to the Sixth Circuit Court of Appeals, petitioner Officer Matthew Foubert was denied qualified immunity from a Section 1983 claim. Respondent, Cheryl D. Lyons, alleged Officer Foubert used unlawful force when he arrested her on August 18, 1998. To avoid cert, respondent claims the legal issues presented by this appeal are resolved and applied consistently throughout the circuits. As demonstrated by Officer Foubert's petition for certiorari and the following analysis, respondent's argument is without merit and Officer Foubert's petition should be granted.

First, the court should resolve the conflict among the various circuit courts with respect to whether the *Graham* reasonableness analysis should be segmented into specific periods of time, which segmentation acts to exclude the reasonable subjective considerations of police officers on the scene.

Second, the court should take this opportunity to clarify the *Harlow* and *Saucier* qualified immunity analysis as applied after the *Hope* decision. Does *Hope*, as respondent suggests, permit a reviewing court to deny qualified immunity without applicable legal authority or "clearly established" law? Does *Hope* permit a reviewing court to rely solely upon *post facto* case law that is distinguishable in a fair way from the case at hand as did the majority opinion?

Third, the court should take this opportunity to address the constitutional-question-first requirement of the qualified immunity analysis. Rather than mandating a no-exception, two-step qualified immunity analysis, the court should allow for exceptions when such analysis has the potential to create clearly established law, thereby denying qualified immunity for police officers except for only the most frivolous of lawsuits.

A. PETITIONER'S EMERGENCY RESPONSE WAS REASONABLE AS A MATTER OF LAW.

1. Initially, this court should reject the assertion set forth in the Sixth Circuit's majority opinion that qualified immunity must be denied simply because the parties had differing recitations of the facts. *Lyons v. City of Xenia*, 90 Fed.Appx. 835, 847-848 (6TH CIR. 2004), attached at Appendix A to Petitioner's Writ of Certiorari.

Respondent did not dispute the fact that Officer Foubert was responding to an emergency dispatch. *Id.* at 844. Respondent did not dispute the fact that Officer Foubert heard Officer Christine Keith, his partner of two years, yell for help over the radio. *Id.* Officer Keith was in the respondent's house to investigate a violent juvenile assault. *Id.* at 843. Respondent did not dispute the fact that Officer Foubert did not hesitate as he ran into the house to his partner's aid. *Id.* at 844. Respondent does not dispute the fact that police officers should act without hesitation when responding to emergency situations.

Respondent also acknowledges she was standing in front of Officer Keith arguing with her when Officer Foubert ran into the house. *Id.* And, for purposes of summary judgment, Officer Foubert accepted that fact as true. Respondent concedes that she physically outmatched Officer Keith by a significant margin. *Id.* Therefore, from his perspective, Officer Foubert saw a large, unidentifiable individual inches from his partner and arguing with her as he ran into the house in response to the distress call. *Id.*

Officer Foubert also accepted for purposes of summary judgment that he "tackled" the respondent, though he did note that the proper police terminology is "balance displacement technique." *Id.* at 844-845. In addition, for purposes of

summary judgment, Officer Foubert accepted the fact that he "threw" the respondent onto her side and handcuffed her. *Id.*

The respondent does not dispute the fact that she was not seriously injured in the course of her arrest. *Id.*

Because Officer Foubert moved for qualified immunity based upon the facts in a light most favorable to the respondent, the Sixth Circuit had an obligation to evaluate the motion in the same manner without relying upon alternative facts Officer Foubert testified to in his deposition. *See Scott v. Clay County, Tenn.*, 205 F.3d 867, 877 (6th Cir. 2000).

2. Police officers must necessarily use some amount of force in the course of a lawful seizure or arrest. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In determining whether Officer Foubert was entitled to qualified immunity for the above-recited use of force, the Sixth Circuit first had to question whether Officer Foubert's actions were objectively unreasonable. *Graham v. Connor*, 490 U.S. 386, 392, 109 S.Ct. 1865, 104 L.Ed.2d 32 (1989). In making this determination, the Sixth Circuit presumably made "allowance for the fact that police officers are often forced to make split second judgments--in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97.

3. This case, however, appears to be further complicated by a split amongst the circuit courts in how to apply the reasonableness analysis. The split is between those circuits that segment the reasonableness analysis, [1] and those circuits that do not.[2] Courts using a segmented analysis to determine

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[1] *See, e.g., Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996); *Bella v. Chamberlain*, 24 F.3d 1251, 1256 (10th Cir. 1994); and *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993).

[2] *See, e.g., Rowland v. Perry*, 41 F.3d 167 (4th Cir. 1994); *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999); *Deering v. Reich*, 183 F.3d 645 (7th Cir.), *cert. denied*, 528 U.S. 1021, 120 S.Ct. 532, 145 L.Ed.2d 412 (1999); and *Hegarty v. Somerset*

the reasonableness of a public official's actions, "carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage." *See, Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996), quoting *Plakas v. Drinksi*, 19 F.3d 1143 (7th Cir.), *cert denied*, 513 U.S. 820, 115 S.Ct. 81, 130 L.Ed.2d 34 (1994).

In the context of police liability, the Sixth Circuit has expressly adopted the segmented application of the *Graham* objective reasonableness test. *Dickerson*, 101 F.3d at 1162. The court limited the "totality of the circumstances" to the facts as they are alleged to have occurred in the moments immediately preceding the use of force. *Id.*

4. Respondent does not argue in favor of the segmented approach to these decisions. Rather, she argues the Sixth Circuit Court of Appeals did not apply a segmented analysis in this case. Respondent points to the majority's discussion of the police dispatch and other facts of the case. This argument is without merit. The court's discussion of all the facts of the case is not sufficient to overcome the presumption that the majority applied its own precedent and the segmented analysis consistently. *See Dickerson*, 101 F.3d at 1162. In fact, justification for the majority's decision can only be found through a strict application of the *Dickerson* segmented analysis.

A reasonable police officer in petitioner's position would have believed his partner was in danger when he heard the undisputed police dispatch and radio calls. Petitioner also had knowledge that Officer Keith was investigating a violent crime. If the majority applied a non-segmented analysis, one must conclude that the dispatch and potential for violence inside an unfamiliar environment were wholly negated in the mere seconds between the time Officer Foubert ran into the house and the use of force.

County, 53 F.3d 1367 (1st Cir. 1995).

By applying a segmented analysis, the majority carved Officer Foubert's initial knowledge and considerations of the emergency situation from the knowledge and subjective considerations he gained after he crossed the threshold of the home. The majority specifically said, "[w]hether Officer Foubert's determination about the law was mistaken or unreasonable still depends upon what the circumstances were *at the time* he used force against Lyons." App. to Petition, 25a. The majority acknowledged, "Officer Foubert's actions would be objectively reasonable if, under the circumstances known to Officer Foubert at the time he used force, a reasonable officer would perceive that Officer Keith's safety was in jeopardy and that force was necessary to secure her safety," but held there was no reason for Officer Foubert to believe Officer Keith's was in danger. *Id.* By not seeing Officer Keith and respondent in a physical altercation the second he ran into the house, Officer Foubert had no reason to believe force was necessary. *Id.* It is just this type of second-guessing by the courts that should be absent from the qualified immunity analysis. *Graham*, 490 U.S. at 397.

It is petitioner's position that the court should not segment any of the subjective considerations a reasonable police officer would have had in these circumstances. Officer Foubert had no specific knowledge about the type of emergency that led to the frantic calls for help and dispatch to the scene. Yet, he responded without hesitation, running into the house to his partner's aid.

Officer Foubert could not overrule a threat to Officer Keith's safety or a threat to his own safety. He could not know the number of occupants of the house, their mental conditions or the potential for ambush or use of weapons. Contrary to the respondent's assertion, the lack of information on each of these and other unknown variables should not lead simply to a conclusion that no force was required in the circumstances.

With all of the possibilities in his mind as he responded to the emergency, there is no doubt Officer Foubert responded reasonably just as Judge Sutton's dissenting opinion explained. *Lyons*, 90 Fed.Appx. at 844.

Rather than segmenting the reasonableness analysis, the court had an obligation to consider all of the facts known and unknown to Officer Foubert. Therefore, this Court should accept review of this case to determine whether and when a segmented reasonableness analysis should be applied to Fourth Amendment claims and whether Officer Foubert's actions were reasonable as a matter of law.

B. CLARIFYING THE SECOND STEP OF THE QUALIFIED IMMUNITY ANALYSIS.

1. Police officers have a constitutional obligation to perform their official duties in a reasonable manner, including the use of force to make a lawful seizure or arrest. *Graham*, 490 U.S. at 394-95. Reasonableness, however, is a highly factual inquiry generally left to the determination of the court or jury. *See Santos v. Gates,* 287 F.3d 846, 855 (9th Cir. 2002). As a practical matter, however, a jury of twelve laypersons cannot be subjected to the same pressures and stress to which the police officer acting in an emergency was subjected. Moreover, the law surrounding the reasonableness of the use of force in any given circumstance is constantly evolving. What was reasonable 10 years ago may not be reasonable today. And, in light of 9/11, what is reasonable today may not have been reasonable 10 years ago.

Police officers and other public officials should not be held civilly and personally liable for reasonable mistakes of judgment or reasonable mistakes in determining what actions are constitutionally or legally permissible in a given circumstance. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The doctrine of

qualified immunity serves to protect public officials from individual liability when the law surrounding an official act is not clearly established such that any reasonable official would have known his or her actions were a violation of the Constitution. *Id. See also, Saucier v. Katz,* 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

Qualified immunity is recognized as more than a defense to personal liability for damages. *See Saucier,* 533 U.S. at 199. Qualified immunity encourages police officers to act without hesitation when confronted with an emergency that requires a quick and decisive response.

The well recognized steps of the immunity analysis first require the court to determine whether the facts as alleged constitute a constitutional or statutory violation. *Id.* As discussed above, there was no constitutional violation in this case. But, even if the court could have legitimately found that there was a question of fact on this issue, it must determine whether the law surrounding the alleged constitutional violation was clearly established. *Id.*

2. In this appeal, the court is faced with a decision by the Sixth Circuit Court of Appeals that was actually split on the question of whether petitioner's use of force was constitutionally reasonable. Yet, the majority of that panel decided that the law was clearly established - that the use of force in those circumstances was a clear violation of the Constitution. Therefore, while the law was so ambiguous that the court itself could not agree on whether the particular use of force was reasonable, the majority still decided petitioner should have been able to sort through the law and make a conscious decision on its application.

The court did not rely upon any legal authority that governed **at the time** of the petitioner's use of force. Nor, did it rely upon any legal authority that could not be distinguished in a fair way from the case at bar, just as Judge Sutton explained in his dissenting opinion. *Id.* at 845.

3. Respondent argues the majority could have went one step further and found that the law was clearly established under the qualified immunity analysis without relying upon any legal authority. Brief in Opposition, p. 7. In doing so, respondent re-characterizes this court's decision in *Hope v. Pelzer,* 536 U.S. 730, 739-40, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).

First, neither the respondent nor the lower courts discussed the *Hope* decision below.

Second, *Hope* does not obviate the need to have clearly established law surrounding the alleged constitutional violation before a public official can be held personally liable for violations thereof. Rather, *Hope* clarified and, in some circumstances, expanded what law could be looked at to determine whether a particular right was clearly established in the context of qualified immunity.

Respondent relies upon the rule in *Hope* that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 740. This is similar to the rule the court of appeals relied upon denying public officials qualified immunity even when the very act for which he is challenged has not previously been declared unlawful. *Lyons,* 90 Fed.Appx. at 849.

The decision in *Hope* simply acknowledged that every use of force will be different, but that does not mean that a police officer did not have "reasonable warning" that his actions were illegal. For instance, in *Hope*, the eleventh Circuit had determined that even though prison guards had violated an inmates constitutional rights by handcuffing him to a hitching post for seven hours without a shirt, water, or bathroom breaks, they were still entitled to qualified immunity because no case had previously addressed that set of facts.

This court said that, while the facts were not "fundamentally similar" to governing case law, cases from both

the Fifth and Eleventh Circuit and an Alabama Department of Corrections regulation gave the prison guards "reasonable warning that the conduct then at issue violated constitutional rights." *Hope*, 536 U.S. at 740. This legal authority clearly rejected the ability of prison guards to tie inmates to fences and the like for punishment. *Id.* It is clear that if a reasonable officer knew that he could not constitutionally tie an inmate to a fence for punishment, then he could not constitutionally handcuff an inmate to a hitching post for punishment.

Unlike this court in *Hope*, the Sixth Circuit nor the respondent relied upon any legal authority that would have given the petitioner reasonable warning that it was unconstitutional to "tackle" a suspect under these particular circumstances. The court only relied upon case law rendered after the alleged incident. Additionally, it is clear that those decisions were factually distinguishable in a fair way from the case at bar. In neither of the cases relied upon by the majority did the plaintiff pose any threat to any officer. *See Santos v. Gates*, 287 F.3d 846 (9th Cir.2002)(gratuitous force used on passive individual) and *Meredith v. Erath*, 342 F.3d 1057 (9th Cir.2003)(female arguing with one of twelve present IRS agents).

Because the court could not even agree amongst itself whether Officer Foubert's actions were constitutionally unreasonable and because neither the court nor the respondent pointed to any governing legal authority that would have given Officer Foubert fair warning of the potential illegality of his actions, this Court must overturn the decision of the lower courts and grant Officer Foubert qualified immunity.

C. STRICT APPLICATION OF THE CONSTITUTIONAL-QUESTION-FIRST REQUIREMENT.

Petitioner recognizes the importance of the first step of the qualified immunity for the continued elaboration of constitutional law. However, as this court recognized in *Bunting v. Mellen*, 124 S.Ct. 1750 (2004), the strict application of the constitutional-question-first requirement in cases such as this one will ultimately result in scenarios where police officers will be unwilling to act for fear of civil liability.

For instance, in denying petitioner qualified immunity in this case, the lower courts were forced to make an express determination that Officer Foubert's conduct was constitutionally unreasonable when it would have been more sensible for them to skip to the second step of the analysis and find there was no clearly established precedent. Now, however, the majority's decision has the import of creating "clearly established" law that will either negate qualified immunity for officers facing similar emergencies or simply stop those officers from responding quickly based upon a growing fear of liability.

Thus, the court should accept this case for review to address the constitutional-question-first requirement of the qualified immunity analysis to determine whether certain exceptions to that requirement should be made.

CONCLUSION

Based upon the foregoing reasons and those stated in the petition, Officer Foubert's petition for a writ of certiorari should be granted.

Respectfully submitted,

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